Office-Supreme Court, U.S.
FILED
APR 3 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

MAMIE BISHOP, LEONARD SCHUMPERT, JANICE THOMAS, AUGUSTUS HUMPHERY and JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION.

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County,
HARVEY R. MONCK,
Assistant Prosecuting Attorney,
Criminal Courts Building,
Cleveland, Ohio 44114,
Attorneys for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-3647

TABLE OF CONTENTS.

Objections to Jurisdiction ---------- 1

Questions Presented ---------- 2

Statement of the Case ---------- 3

Argument ---------- 11

(1) The Place to Be Searched ---------- 12

(2) Person to Be Seized ---------- 12

(3) The Thing to Be Searched For ---------- 13

(4) That the Complainant Believes or Has Good Cause to Believe That the Things Are There Concealed ---------- 14

(5) Complainant Must State the Facts Upon Which Such Belief Is Based ---------- 15

The Judge or Magistrate May Demand Other and Further Evidence Before Issuing Such Warrant 16

Conclusion ---------- 23

TABLE OF AUTHORITIES.

Cases.

Aguilar v. Texas. 378 U. S. 108 ---------- 16, 18, 19

Beck v. Ohio, 379 U. S. 89 ---------- 16, 20

Brinegar v. U. S., 338 U. S. 160 ---------- 15

Cincinnati v. Bush, 24 O. N. P. N. S. 81 ---------- 12

Giordenello v. United States, 357 U. S. 480, 2 L. ed. 2d 1503 ---------- 18

Ker v. California, 375 U. S. 23 ---------- 17

McDonald v. United States, 335 U. S. 451 ---- 20, 21, 22, 23

Miller v. United States, 357 U. S. 301 ---------- 18

Nicholas v. City of Cleveland, 125 O. S. 479 13

Rovario v. United States, 353 U. S. 53 17

Rugendorf v. United States, 376 U. S. 528 16

Stanford v. Texas, ____ U. S. ____, 33 Law Week 4140 20

State v. Beck, 175 O. S. 76 16

State v. Gardner, 73 Abs. 319, 137 N. E. 2d 448 .. 14

United States v. Ventresca, ____ U. S. ____, 33 Law Week 4193 ..... 16, 20

Texts.

8 *Wigmore, Evidence*, Section 2374 (McNaughton rev. 1961) 16

Statutes.

Ohio Revised Code:

Sec. 2915.13 ..... 3, 5, 14

Sec. 2933.21 13

Sec. 2933.22 ..... 11, 14

Sec. 2933.23 ..... 11, 16

In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879.

MAMIE BISHOP, LEONARD SCHUMPERT, JANICE THOMAS, AUGUSTUS HUMPHERY and JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County, Ohio, and the Supreme Court of Ohio. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused leave to appeal.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

QUESTION PRESENTED.

Were petitioners illegally convicted upon evidence obtained in a search and seizure under a search warrant where (1) acting upon information from a reliable informer, whose information has many times previously been found accurate, and upon three days' surveillance, police officers trailed a suspect to a certain apartment house; and (2) after police officers familiar with clearinghouse operations entered said apartment house through a common doorway and proceeded along a common hallway to suite No. 6 on the second floor, where they heard the clatter of adding machines, typewriters and other equipment indispensable to clearinghouse operations, they did not make an arrest but instead left the scene to procure a search warrant; and (3) they testified before a magistrate as to the details of their surveillance, personal observations and information; and (4) after obtaining a search warrant the officers returned to said suite No. 6 and upon peeking through the keyhole observed actual clearinghouse operations in progress in said suite.

STATEMENT OF THE CASE.

Leonard Schumpert and five other persons were indicted on a charge of carrying on a clearinghouse (R. C. 2915.13). Defendants filed a motion to quash the search warrant and to suppress evidence seized pursuant to the search warrant.

The cause came on for hearing before a Judge of the Common Pleas Court of Cuyahoga County, Ohio, on the motion of the defendants. Testimony and evidence were presented by the State and the defense. At the conclusion of arguments by counsel, the court overruled the motion and admitted the evidence. Trial by jury was waived by all the defendants. It was stipulated by and between counsel that the evidence to be presented on the merits would be the same as was presented in and during the motion to quash the search warrant and suppress the evidence.

The court found five of the defendants guilty as charged in the indictment. The Court of Appeals affirmed their conviction. The Supreme Court of Ohio refused leave to appeal and dismissed an appeal filed as of right.

"Clearinghouse," sometimes called "Numbers," is a widely spread and elaborate scheme of chance that involves many persons in its complicated operation. (R. 2.) Any amount from one penny to ten dollars can be wagered. One can place a bet on any number from 000 to 999. The winning number is then derived from a certain daily publication of quotations of stocks and bonds in the financial columns of the newspapers. If the winning number appears in such column, the odds are five hundred to one. Upon winning, a person betting one penny receives $5, a person betting $10 receives $5000. These tremendous odds entice and take money from those who can least afford to pay.

To illustrate the operation, let us assume that a person desires to wager ten cents on number "422." That person will seek a "writer." The "writer" may be on a street corner, at a newsstand, shoe shine parlor, tavern, in a home or most anywhere. (R. 3.) The "writer" will then accept the ten cent wager from the player and will record it on a pad. The player is given a carbon copy of his ten cent wager. A "writer" generally accepts these wagers from many persons and at about 1:30 P. M. he turns over the wager slips to a "pick-up man." The "pick-up man" gathers all the wagers from the various writers and takes them to a "drop location." At the "drop location" a trusted employee of the operation will then pick up all the bet slips and take them to a control office. A "drop location" is normally very secret. It could be in an automobile. It varies from day to day.

The clearinghouse office is the center of the entire operation. To avoid detection its location is also secret and is easily movable from place to place. All wagers have to be in the office not later than 2:30 P. M. At the central office, male or female personnel tabulate every wager slip. Seventy-five per cent is forwarded to the central office. Out of this the "pick-up man" gets a commission of 10%. The balance of 65% goes to clearinghouse operator.

At about 4:00 P. M. the winning number is selected from the stock edition of the local paper and the slips are then scanned to ascertain whether any player has selected the winning number. If any winning numbers are found, they are laid aside and circled with red. The amount of the winnings is deducted from the remittance made by the "pick-up man." The total of the business, the scanning of numbers and the compilation of the necessary books and records are all made at the central office. Adding machines are used. The entire operation is in violation of Section

2915.13 of the Revised Code of Ohio. Although sometimes as many as twenty, generally, at least four or five persons are employed in the central office, which, as we have pointed out, is the core of the entire operation. The arrests in this case were made at the central office.

The Bureau of Special Investigation of the Police Department of the City of Cleveland is assigned to investigate rackets and gambling operations. Sgt. Delau of that bureau, an officer with thirteen years of experience in investigation of clearinghouse activity and very familiar with its method, paraphernalia and manner of operation, testified for the State. On May 14, 1962, Sgt. Delau received information from a reliable source that one John Powers was operating a clearinghouse office at 12806 Edmonton Avenue, in Cleveland. (R. 18.) Powers was well known to the police both as a panderer and as a clearinghouse operator. Mamie Bishop Powers, one of the defendants herein, is his sister.

On May 14, the officer checked the address on Edmonton Avenue without incident. The following day, May 15, the officer spotted John Powers operating his car into the drive at 12806 Edmonton Avenue. After being in the house about ten minutes, Powers and a woman companion returned to the automobile and drove away. The officer was unable to follow the car to its destination but he did obtain the license number.

The following day, May 16th, Powers again emerged from the house on Edmonton Avenue with a woman. This time the officer traced them to 12611 Woodside Avenue in Cleveland, where Powers picked up two more women. 12611 Woodside was the residence of the defendant Mamie Bishop Powers. The officer continued to trail this party from Woodside Avenue to 739 E. 125th Street. At this point the three women hurriedly left the car and walked

along the building at this address. It was a two-story brick building containing six stores and residential apartments. In the rear of the building was a common entrance to the four residential apartments on the second floor. When they arrived at this address, the officer was able to see Powers and the three women walking along the side of this building toward this entrance. The officer then instructed patrolmen McCool and Wandra to make observations of the building.

On May 17th, 1962, when officers McCool and Wandra proceeded to the apartment at 739 E. 125th Street they had information that a 1961 Falcon automobile bearing Ohio License Number FU 419 would be driven to the apartment by John Powers, who had been trailed there on the day before by Sgt. Delau. They had a description of John Powers. This information was corroborated by the fact that when they arrived at the scene at 12:30 P.M., the Ford Falcon did arrive and it was driven by John Powers, who was accompanied in the car by two women. The officers had been instructed to ascertain exactly where these persons were going. The officer saw Powers and the two women enter a door at the south side of the brick building at 739 E. 125th Street. Officer Wandra then left the ordinary truck in which the police officers were parked and proceeded to the apartment building in order to find out into which particular apartment these persons were going. The address 739 E. 125th Street is posted on a driveway leading to these apartments located over the business stores.

The officer first attempted to ascertain the names of the occupants of these apartments but could not do so because there were no name plates on the mail boxes. He then checked the City Directory for the names of residents there for the past six years. All the names checked were

unknown. (R. 40.) He then entered a common doorway leading to the corridor on the first floor. There were two apartments on the first floor and there was no noise or activity coming from either of these apartments. He then went up to a common stairway to a hallway on the second floor, where Apartments 5 and 6 were located. The hallway doors to these apartments were closed but he heard human voices and the considerable clatter of adding machines coming from both apartments. He said, "There was noise coming from both apartments. There was a radio and voices of human talking and also adding machine noises." (R. 38.) This was at 3:00 P. M. It was brought out again under cross-examination that the corridor and stairway the officer traversed were for the common use of anyone who wished to visit the apartments. (R. 138.)

After these observations the officer contacted Sgt. Delau, who checked the telephone criss-cross directory to see if there were any names listed to Apartments 5 and 6. He was unable to find any. (R. 44.) The Sergeant then visited the Police Prosecutor's Office, where the affidavit was prepared. (State's Exhibits 1 and 2.) The officer presented it to Judge Fuerst of the Municipal Court of the City of Cleveland. The judge was informed in detail of the disclosures made in three days of surveillance by all the officers. (R. 46.) The judge signed the affidavit and a search warrant was obtained.

After obtaining the search warrant, at 3:40 P. M. the officers again proceeded to 739 East 125th Street. Sgt. Delau stationed Patrolman McCool on the outside of the building to watch for any gambling paraphernalia that might be tossed out the window. Sgt. Delau and Patrolman Wandra proceeded to the second floor of the building to Apartment 6. They heard considerable noise of adding machines coming from this apartment. (R. 48.) Sgt. Delau

then looked into the keyhole. He said he was positive that there was a clearinghouse office in the apartment and knocked on the door. It will be remembered that he had much experience with clearinghouse activity. The officer knocked on the door and the defendant Juanita Umphryes opened it. (R. 49.) He testified:

"Q. Did you talk to Juanita Umphryes at that time?

A. Only this, I asked her if she lived there and she said, yes. I said 'I am Sgt. Delau of the Cleveland Police Department.' I showed her a search warrant. I said, 'You're running a clearinghouse office. I am coming in.' At that time, I could see two of the defendants seated there in the living room.

Q. You say you saw two of the defendants sitting in the living room?

A. Yes.

Q. Who did you see seated in the living room?

A. Leonard Schumpert (defendant) was seated facing me, no more than eight feet away, and Joe Harper (defendant) was seated alongside of him, sort of with his face towards me at the door.

Q. What else did you observe just before you walked in?

A. From the doorway, I could look down a little, small hallway, and seated on a chair with an adding machine in front of her, I seen one of the defendants seated in what I later found out was a bedroom, and the defendant was Augusta Humphrey.

Q. Did you make any other observations when you entered, then?

A. Yes; at that time from the doorway, I could see this: I could see Leonard Schumpert seated on the couch in the living room facing me. He had an adding machine tape in his hand which he seemed to be scrutinizing.

On the floor in front of him I seen other adding machine tapes piled up in front of him.

Q. Was that the extent of your observations as you were there in the doorway?

A. From the doorway, yes.

Q. Then what did you do?

A. With that, I told Patrolman Wandra to watch the two gentlemen and Juanita Umphryes in the living room. I said, 'You just have them stay right where they are.' I instructed both Harper and Schumpert to remain seated where they were. I walked back to where, to just a short distance to where Augusta Humphrey was seated and I told her to sit tight and just as I walked back here, I could see in the bedroom off to my right, which I had not earlier seen, I seen two more of the defendants in that particular bedroom.

Q. Who were they?

A. Those two defendants closest to the door was Mamie Bishop Powers and alongside of her, a little further in the bedroom, was Janice Thomas.

Q. Now, Officer, tell us what happened after that

A. Well, I noticed in front of them they both had an adding machine, and there was an obvious display of clearing house slips right in front of them, so in watching them, I told this other officer, I told Wandra to holler out for Patrolman McCool to come up. Patrolman McCool came up and I told him to keep Mamie Bishop Powers and Janice Thomas in custody there, to question them, to search the room and all clearinghouse evidence, to collect that particular evidence.

I told Patrolman Wandra to watch Augusta Humphrey closer and then returned to the living room where Schumpert, Harper and Umphryes were seated." (R. 50, 51, 52.)

The six defendants were then arrested. With reference to questioning at the scene Sgt. Delau said, "I requestioned Schumpert again; I asked him just what part he played in it. He said, 'I'm checking the tapes.' He said,

'You got me; that's all there is.' " (R. 53.) After questioning the various persons at the scene the officers gathered up the clearinghouse paraphernalia that was on the premises. It was stipulated that the paraphernalia picked up was prohibited by statute.

Concerning the original informant, under cross-examination it was brought out that over a period of sixteen years this informer had related reliable information to the police officer. During this period his information had been the basis for twenty-five arrests. (R. 63.) Also over the years the officer had obtained between eight and ten search warrants derived from this man's information. (R. 65.)

The amount of clearinghouse wagers including the loose tabulation of the writers was taken at the scene. Some of the tabulation contained winning numbers for that particular day. Incidentally, at 4:30 P. M. when the officers were in Apartment 6 amidst the clearinghouse activity, Powers made a telephone call into the apartment to talk to the defendant Schumpert—thereby corroborating the information furnished by the original informant to the effect that Powers was in contact with the operation.

ARGUMENT.

In Ohio the issuance of a search warrant is regulated by statutes. Section 2933.22 of the Ohio Revised Code requires that there must be probable cause for the issuance of a search warrant. Under Section 2933.23 an affidavit must first be filed with a judge or magistrate. The affidavit must contain certain subject matter and the judge may demand other and further evidence before he issues the warrant. In this case the Honorable Norman Fuerst, a Judge of the Municipal Court of Cleveland, issued a search warrant based upon: (1) an affidavit duly filed and (2) oral testimony as to details by arresting officers. The petition herein is mainly based upon a claim that the required affidavit is defective.

We will discuss the chief complaints of the petitioners as they are directed towards the required allegations of the affidavit. The affidavit itself is attached to the record as State's Exhibit 2. Section 2933.23 requires that the affidavit must set forth the following specified subject matter:

1. The place to be searched.
2. The person to be seized.
3. The thing to be searched for.
4. That the complainant believes or has good cause to believe that the things are there concealed.
5. The complainant must state the facts upon which such belief is based.

In addition to the above, the judge or magistrate may demand other and further evidence before issuing such warrant.

(1) The Place to Be Searched.

On page 23 of the petition it is stated that the affidavit "did not with sufficient particularity describe the place to be searched," that it contains two addresses. The fact is that only one address is designated. It is 739 E. 125th Street, Cleveland, Ohio. Two suites are mentioned at that address, which is an apartment house. They are "suites 5 and 6 up." The officers searched suite Number 6. The warrant is not made any the less valid by reason of the fact that the officers searched only one of two suites they were authorized to search at that address. "The requirement of a description of the house or place to be searched is complied with where the warrant and affidavit upon which it is based describe the place to be searched as premises of a certain number on a certain street." *Cincinnati v. Bush*, 24 O. N. P. N. S. 81.

(2) Person to Be Seized.

Petitioners further complain that no persons are *named* in the affidavit or warrant. The affidavit sets forth "unknown persons." The trial court conclusively disposed of this complaint in the following from his opinion (R. 314):

> " 'The person to be seized,' is described sufficiently in the affidavit, to this Court's view, persons or unknown persons, and caused the taking of the evidence that has been presented; that it was impossible for the officers to know exactly who would be in that particular suite at the time in which they executed the search warrant.
>
> They made an effort by checking cross indices, telephone books, checking mailboxes, to determine who the occupant of such a suite was and by the same token, they knew from their experience and from the evidence that they had gathered prior to the

signing of the affidavit that this was a clearinghouse operation. So that, therefore, they could not, with any degree of accuracy or upon firm belief place on the affidavit the name of any person they could swear to as being in possession of gaming material."

In a leading Ohio case, *Nicholas v. City of Cleveland*, 125 O. S. 479, the Court stated:

"It was undoubtedly the purpose of the Legislature to require the complainant filing an affidavit to conform to the various particulars of that section, so that an officer executing a John Doe warrant, as in this case, could search only the particular place described in the affidavit and could seize only the person named in the affidavit, *if his name be known.*"

Here the petitioners' names were not known to the officers. Incidentally in *Nicholas v. City of Cleveland* the warrant was held defective on other grounds. Unlike the instant case, the affidavit in the *Nicholas* case did not state the facts upon which the belief of the officers was based.

(3) The Thing to Be Searched For.

Petitioners contend that the affidavit does not set forth the thing to be searched for. The affidavit clearly sets forth the following described property: "clearinghouse bet slips, bet sheets, tapes, adding machines and other paraphernalia generally associated with clearinghouse operations." The trial court observed, "This detailed list of personal property substantially satisfied the requirements of the statute regarding the things to be searched for and seized." (R. 313.) "In addition to that, this paraphernalia also comes under Section 2933.21 which I have previously read to you, Section (E), which describes that a judge may issue a search warrant for gaming apparatus." (R. 313.) It will be remembered that the

petitioners were convicted for violating Section 2915.13 R. C. which provides:

> "No person shall establish, open, set on foot, carry on, promote, make, draw, or act as 'backer' or 'vendor' for or on account of a scheme of chance known as 'policy,' 'numbers game,' 'clearinghouse,' * * *."

In *State v. Gardner,* 73 Ohio Law Abs. 319, 137 N. E. 2d 448, it was held that an affidavit alleging possession of "number slips" to be used in carrying on a numbers game states an offense.

(4) That the Complainant Believes or Has Good Cause to Believe That the Things Are There Concealed.

Section 2933.22 R. C. provides:

> "A warrant of search or seizure shall issue only upon probable cause, supported by oath or affirmation particularly describing the place to be searched and the property and things to be seized."

Petitioners say that the affidavit did not allege the existence of reasonable grounds to believe that a crime was in the process of commission. This contention is contrary to fact. The officers acted upon reliable information concerning a known character (Powers) active in clearinghouse operation. They trailed Powers along with two women to the apartment house in question. They entered a common doorway and climbed a common stairway to the exterior of the door to the particular apartment involved. Here they heard considerable noise of human voices coupled with the clatter of adding machines coming from inside this apartment. To their experienced ears such noises meant characteristic sounds of clearinghouse activity. The sound of such activity coming from within the apartment certainly justified a man of reasonable caution

to conclude that the crime of operating a clearinghouse was being committed.

This Court in *Brinegar v. U. S.*, 338 U. S. 160, has defined the standard of probable cause: That the facts must be sufficient unto themselves to warrant belief by a man of reasonable caution that a crime is being committed.

(5) Complainant Must State the Facts Upon Which Such Belief Is Based.

Petitioners claim that the affidavit fails to allege sufficient facts upon which to base probable cause. The trial court found that examination of the affidavit and the search warrant itself disclosed that the affidavit was prepared and the search warrant was issued, "* * * first of all, upon observations of members of the Cleveland Police Department and, secondly, from information from confidential sources." (R. 315.) The trial court commented further: "Taking the evidence as a whole, it is clear that the information that they received from the confidential source was merely the triggering device by which the observations and the subsequent information was gathered by members of the Cleveland Police Department." (R. 315.) The officers did not rely solely upon the information they had received concerning the clearinghouse activity of Powers but they went further and actually made positive observation at a precise point to which the information concerning Powers had led them. Here we have credible confidential information from an informant *plus* actual observation by police officers. These facts formed the foundation upon which the officers had good cause to believe that clearinghouse activity with its incident equipment and paraphernalia existed in the apartment.

The Judge or Magistrate May Demand Other and Further Evidence Before Issuing Such Warrant.

In this case we have the additional fact that acting under the above quoted Section 2933.23, Judge Fuerst did ask for and obtain further evidence before he issued the warrant. As the trial court observed, "* * * this evidence was given not only by the affiant to the affidavit but also by all three officers whose information was pooled to form the basis for the issuance of the search warrant." (R. 316-7.) Therefore, in consideration of all the allegations of the affidavit together with the oral testimony, the judge, in his exercise of sound discretion, issued the warrant.

The petitioners claim that the court erred in failing to direct the state to disclose the identity of the alleged informer and question the trial judge's reliance on *State v. Beck*, 175 O. S. 76, in ruling against disclosure. In invalidating the search and seizure in *Beck* (*Beck v. Ohio*, 379 U. S. 89), this Court did not reverse the ruling against disclosure in *State v. Beck;* and other cases recently decided by this Court (*Rugendorf v. United States*, 376 U. S. 528; *Aguilar v. Texas*, 378 U. S. 108; *United States v. Ventresca*, 33 Law Week 4193) have reiterated the conclusion that the identity of the informer need not be disclosed. The rule is well stated in 8 *Wigmore, Evidence*, Section 2374 (McNaughton rev. 1961):

> "A genuine privilege, on the fundamental principle stated *supra* Section 2285, must be recognized for the *identity of persons supplying the government with information concerning the commission of crimes.* Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually con-

dition his cooperation on an assurance of anonymity—to protect himself and his family from harm, to preclude adverse social reaction and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in nondisclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such persons ends their usefulness to the government and discourages others from entering into a like relationship.

That the government has this privilege is well established, and its soundness cannot be questioned."

In *Rovario v. United States,* 353 U. S. 53, relied on by petitioners, the informant took a material part in bringing about the defendant's possession of the contraband.

The Federal rule in search and seizure is well established. Whether or not a search is reasonable depends upon the facts in each particular case.

Much of the petitioner's argument is devoted to a blanket discussion of the decisions of this Court on search and seizure. Each of the cases cited is distinguishable on the facts. The federal cases on search and seizure are well summarized by Mr. Justice Clark (who had written the opinion in *Mapp v. Ohio*) in *Ker v. California,* 375 U. S. 23. Headnotes five and eight read:

5. "Mapp v. Ohio did not attempt the impossible task of laying down a fixed formula for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures, but recognized that the Supreme Court would be met with recurring questions of the reasonableness of searches and that reasonableness is in the first instance for the trial court to determine, thus indicating that the usual weight be given to findings of trial courts."

8. "There is no formula for the determination of reasonableness of a search, but each case must be decided on its own facts and circumstances."

To illustrate the distinction in cases cited by petitioners in *Miller v. United States,* 357 U. S. 301, the officers broke the door without a warrant and without announcing themselves. There was no notice of authority.

In *Giordenello v. United States,* 357 U. S. 480, 2 L. ed. 2d 1503, the officers arrested under an arrest warrant. Unlike the instant case, there the complainant gave no source of the complaint's belief. The officer arrested on his own complaint and acted on the basis of personal knowledge *with no observation or setting forth probable cause.* Giordenello drove to a certain house followed by a well known police character. When he left the house he was nabbed by the police.

Petitioners cite *Aguilar v. Texas,* 378 U. S. 108, 12 L. ed. 723, claiming the analogy between the case here on appeal and the *Aguilar* case is "almost perfect." We submit that the analogy is not as perfect as appellants would have the Court believe. In fact, the *Aguilar* case strengthens the State's position.

The affidavit which the police officers in *Aguilar* submitted in support of their application for a search warrant, is set forth in the opinion of the Court as follows:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates, and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law."

In a footnote to the foregoing, it is stated:

"1. The record does not reveal, nor is it claimed, that any other information was brought to the at-

tention of the Justice of the Peace. It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention. Giordenello v. United States, 357 U. S. 480, 486, 2 L. ed. 2d 1503, 1509, 78 S. Ct. 1245; 79 CJS 872 (collecting cases). In Giordenello, the Government pointed out that the officer who obtained the warrant "had kept petitioner under surveillance for about one month prior to the arrest." The Court of course ignored this evidence, since it had not been brought to the magistrate's attention. The fact that the police may have kept petitioner's house under surveillance is thus completely irrelevant in this case, for, in applying for the warrant, the police did not mention any surveillance. Moreover, there is no evidence in the record that a surveillance was actually set up on petitioner's house. Officer Strickland merely testified that 'we wanted to set up surveillance on the house.' If the fact and results of such a surveillance had been appropriately presented to the magistrate, this would, of course, present an entirely different case.

Headnote 1 holds

1. In passing on the validity of a search warrant, the reviewing court may consider only information brought to the magistrate's attention; hence, the fact that the police may have kept a suspect's house under surveillance is irrelevant where, in applying for the warrant, the police did not mention any surveillance."

Thus, there is a clear distinction between the situation in *Aguilar* and that in the case of these petitioners. Here not only did the affidavit mention "observation by members of the Cleveland Police Department," but the magistrate was informed in detail of the three days surveillance by all the officers whose information was pooled to form the basis for the issuance of the search warrant.

The recent decision of this Court in *Stanford v. Texas*, ____ U. S. ____, 33 Law Week 4140, relied on by the petitioners herein, refers to search warrants that (a) are general in nature, and (b) fail to describe particularly the place to be searched and the person or property to be seized. Here we have a warrant that specifically sets forth contraband to be seized at a specific address and describes the contraband as "clearing house bet slips, bet sheets, tapes, adding machines and other paraphernalia associated with clearinghouse operation."

The judgment of the magistrate in the present case in issuing the search warrant after hearing evidence in detail of the person observations and daily surveillance by the police officers is supported by the even more recent decision of this Court in *United States v. Ventresca*, ____ U. S. ____, 33 Law Week 4193.

Petitioners rely on *Beck v. Ohio*, 379 U. S. 89, to support their contentions, but the *Beck* decision was based on the state of the record in that case, which did not show what the officer's observations consisted of.

In the conclusion to the petition herein, *McDonald v. United States*, 335 U. S. 451, is cited. In the *McDonald* case the officers thought they heard an adding machine and "one of them opened a window leading to the landlady's room and climbed through it." There was an actual breaking and entering. They then proceeded to the second floor and stood on a chair and looked into the transom. They observed number slips inside the defendant's room and arrested the defendant McDonald. The opinion by Justice Douglas concluded:

> "When the officers heard the adding machine and at the latest when they saw what was transpiring in the room they certainly had adequate grounds for seeking a search warrant."

In the instant case when the officers heard the adding machines, they left the scene and returned to the court to procure a search warrant. Moreover, in the *McDonald* case the officers broke and entered the landlady's home by climbing through the window, while in the instant case there was no breaking and entering. The officers entered a common doorway in an apartment house, climbed a common stairway, and when they came to the door of Apartment 6, where they made their observations, they did not make an arrest but instead returned to the police station and procured a search warrant and then returned to the apartment in question. In the *McDonald* case, in a concurrent opinion, Mr. Justice Rutledge made the following observation:

> "* * * had the approaches been thrown open by an obliging landlady or doorman, they would have been legally in the hallways. Like any other stranger, they could then spy or eavesdrop on others without being trespassers. If they peeped through the keyhole or climbed on a chair or on one another's shoulders to look through the transom I should see no grounds on which the defendant could complain. If in this manner they, or any private citizen, saw a crime in the course of commission, an arrest would be permissible.
>
> But it seems to me that each tenant of a building, while he *has no right to exclude from the common hallways* those who enter lawfully, does have a personal and constitutionally protected interest in the integrity and security of the entire building against unlawfully breaking and entry. Here the police gained access to their peeking post by means that were not merely unauthorized but by means that were forbidden by law and denounced as criminal. In prying up the porch window and climbing into the landlady's bedroom, they were guilty of breaking and entering—a felony in law and a crime far more serious than the one they were engaged in suppressing. Having

> forced an entry without either a search warrant or an arrest warrant to justify it, the felonious character of their entry, it seems to me followed every step of their journey inside the house and tainted its fruits with illegality."

Here the occupants of Apartment 6 had "no right to exclude from the common hallways the police officers who entered lawfully." As Justice Rutledge points out in the *McDonald* case, here it inevitably follows that the officers made a lawful entry into the building, and after the Sergeant peeked through the keyhole and saw a felony in progress they had a right then and there to make an arrest without a warrant. Nevertheless, he did use the warrant, even though it was not required. He knocked on the door and informed the occupants of the room as to his identity and the fact that he had a search warrant.

CONCLUSION.

The officers did use a search warrant in this case. They obtained a warrant from a judicial officer "upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the things to be seized. Moreover, as observed by Mr. Justice Rutledge in *McDonald v. United States,* as events progressed, without any breaking or entering, to the point where the officers actually saw a felony being committed, a search warrant was not even necessary.

These petitioners have not shown any deprivation of constitutional protection against unnecessary invasions of privacy entitling them to review by this Court. The writ should therefore be denied.

Respectfully submitted,

JOHN T. CORRIGAN,
Prosecuting Attorney of Cuyahoga County, Ohio,

HARVEY R. MONCK,
Assistant Prosecuting Attorney,
Attorneys for Respondent.